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In the Supreme Court of the United States

OCTOBER TERM, 1995

J. GEILS BAND EMPLOYEE BENEFIT PLAN, JOHN GEILS, JR., STEPHEN BLADD, RICHARD SALWITZ, AND SETH JUSTMAN,
PETITIONERS,

v.

SMITH BARNEY SHEARSON, MATTHEW McHUGH, AND KATHLEEN HEGENBART,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY MEMORANDUM

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Confronted with a square conflict among the circuits warranting this Court's review, the respondents have attempted to rewrite the decisions of the Courts of Appeals for the First and Seventh Circuits that underlie this petition. Neither the cases, the facts, nor simple logic, however, will bear such revision.

I. IN ERISA CASES, AS IN ALL OTHERS, THE FIRST CIRCUIT REQUIRES THE PLAINTIFF TO EXERCISE DUE DILIGENCE EVEN WHERE THE DEFENDANT HAS ACTIVELY CONCEALED THE WRONG.

The respondents make no effort to defend the reasoning of the First Circuit in this case. Instead, in the hope of defeating a grant of certiorari, they endeavor to recast it completely.

The respondents argue that the issue of whether diligence is required by a plaintiff asserting fraudulent concealment is not implicated in this case because the First Circuit supposedly held that a "post-fraud communication does not 'conceal' if the circumstances under which it was made put the plaintiff on notice that it may be misleading." Respondents' Brief in Opposition ("Resp. Brief") at 8.

The First Circuit made no such holding. To the contrary, it expressly held that it "need not make any specific findings regarding the issue of whether [the respondents] . . . concealed the alleged fraud." Petition for a Writ of Certiorari ("Pet.") at A-18, 76 F.3d at 1256. It did so because it erroneously believed that, in order to avail themselves of the doctrine of fraudulent concealment, the petitioners were required to exercise diligence in discovering their claim, and had not done so here. *Id.* The respondents suggest that they did not engage in fraudulent concealment at all because, although their quarterly statements to the petitioner J. Geils Band Employee Benefit Plan ("the Plan") reported that certain highly risky limited partnership interests had retained their value at purchase price, monthly statements contained a fine print legend disclosing that the market values were not necessarily as listed. Resp. Brief at 9-10. The respondents, however, have not disputed (nor could they meaningfully do so on summary judgment) that respondent Hegenbart repeatedly and falsely stated to the petitioners that the limited partnership interests were worth what had been paid for them and, in any event, Shearson's quarterly reports continuously deceived the petitioners by falsely stating that the limited partnership interests were "blue chip corporate" investments enjoying an expected annual return of 12%. Pet. at 4.[1] At the very minimum, there were material disputes of fact as to whether the respondents

[1] The respondents have not deigned to identify "the gross mischaracterization of facts" they allege to be found in the Petition for a Writ of Certiorari, Resp. Brief at 2 n.4, contrary to the rules of this Court. *See* Supreme Court Rule 15.2.

had actively concealed their fraud, precluding summary judgment on this issue.

The respondents further suggest that the First Circuit has not rejected the doctrine of equitable estoppel as it bears on claims of fraudulent concealment, and thus remains open to dispensing with the requirement of due diligence where the defendant has actively concealed his wrong. *See* Resp. Brief at 8. They also appear to argue that the First Circuit's holding in this case was somehow limited to the unique circumstance "where contradictory communications form the basis for the alleged active concealment." *Id.* Nothing in the First Circuit's decision, however, remotely indicates such a limitation. To the contrary, the First Circuit, after noting the contrary rule of the Seventh Circuit, held that "In this Circuit, however, we have held that '[i]rrespective of the extent of the effort to conceal, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with notice of a potential claim.'" Pet. A-24, 76 F.3d at 1259, *quoting Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) (alleged fraudulent concealment of bad faith negotiation). *See also Kennedy* v. *Josephthal & Co., Inc.*, 814 F.2d 798, 802-03 (1st Cir. 1987) (affirming dismissal of securities fraud claims under statute of limitations based upon plaintiffs' failure to exercise due diligence notwithstanding the defendant's "continuing fraudulent misrepresentations and omissions"). The First Circuit's absolute requirement of due diligence, and its express rejection of contrary Seventh Circuit precedent, could not be clearer.

II. The Seventh Circuit Excuses Any Lack of Due Diligence Where the Defendant Has Engaged in Active Concealment.

Not content with rewriting the First Circuit's decision in this case, the respondents seriously misstate the rulings of the Seventh Circuit as well. The respondents claim that "the

petitioners are mistaken in their assertion that the Seventh Circuit embraced the equitable estoppel doctrine" for purposes of the ERISA statute of limitations, 29 U.S.C. § 1113, Resp. Brief at 7, and purport to support this contention with quotation from *Wolin* v. *Smith Barney, Inc.*, 83 F.3d 847 (7th Cir. 1996). But *Wolin* expressly adopted the doctrine of equitable estoppel insofar as it is part of the fraudulent concealment doctrine that § 1113 incorporates. *Wolin*, 83 F.3d at 850. What *Wolin* explicitly declined to address was the extent to which equitable estoppel *not* constituting fraudulent concealment (such as a promise not to plead the statute of limitations) would apply in a § 1113 case. *Wolin*, 83 F.3d at 855. In this case the petitioners assert that the respondents are equitably estopped from asserting the statute of limitations by their efforts to fraudulently conceal their past misconduct. Any other type of equitable estoppel is simply a red herring.

III. The Issue Presented Has General Application.

If the Seventh Circuit's remarks adopting the equitable estoppel prong of fraudulent concealment for purposes of § 1113 in *Wolin* and *Martin* v. *Consultants & Administrators, Inc.*, 966 F.2d 1078, 1094-96 & nn.17-20 (7th Cir. 1992), were not enough, the doctrine's applicability to ERISA fiduciary cases is clear by necessary implication. As the petitioners noted in their Petition for a Writ of Certiorari, Pet. 7, and as the respondents have not disputed, the seventh and other circuits are in agreement that "§ 1113 'incorporates the fraudulent concealment doctrine.'" *Radiology Center, S.C.* v. *Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990) *(quoting Schaefer* v. *Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th Cir. 1988)); *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994); *J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, Pet. A-13, 76 F.3d 1245, 1253 (1st Cir. 1996); *Barker* v. *American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995). The Seventh Circuit's repeated holding that due diligence is not required where the defendant has engaged in affirmative acts of fraudulent

concealment, *see, e.g., Tomera* v. *Galt*, 511 F.2d 504, 510 (7th Cir. 1975), thus most decidedly applies to cases under § 1113.

The same point disposes of the respondents' assertion that "generalizations from the opinion" of the Court in this case "would hardly be of assistance to courts confronted with application of tolling doctrines in cases not governed by the peculiar wording of Section 1113." Resp. Brief at 13. Claims against ERISA fiduciaries implicating § 1113 are, of course, important in their own right. But the undisputed unanimity of the circuits that § 1113 incorporates the federal common law doctrine of fraudulent concealment necessarily implies that this Court's delineation of the contours of that doctrine — to include or exclude equitable estoppel — will have general application. Because the fraudulent concealment doctrine is incorporated in the statute, moreover, determination of whether it requires a plaintiff to exercise due diligence in the face of affirmative acts of concealment does not, as the respondents aver, require the statute to be rewritten. This Court should grant certiorari to resolve this important question of federal law.

Respectfully submitted,

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